

ST 05-16

Tax Type: Sales Tax

Issue: Unreported/Underreported Receipts (Non-Fraudulent)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**ABC LIQUORS AND LOUNGE,
Taxpayer**

**No. 04-ST-0000
IBT #: 0000-0000
NTL # 00 0000000000000000
NTL # 00 0000000000000000
NTL # 00 0000000000000000
Tax pds. 1/00-5/03**

**Charles E. McClellan
Administrative Law Judge**

RECOMMENDATION FOR DECISION

Appearances: George Foster, Special Assistant Attorney General, for the Illinois Department of Revenue (the "Department"); John Doe for ABC Liquors and Lounge ("Taxpayer").

Synopsis:

This matter arose from a protest filed to three Notices of Tax Liability issued to Taxpayer by the Department for the periods beginning with January 2000 through May 2003. The Department based its Notices of Tax Liability on its determination of under-reported taxable sales for the audit periods. An evidentiary hearing was held on June 22, 2005.

I recommend that the Notices of Tax Liability be made final.

Findings of Fact:

1. The Department issued the Notices of Tax Liability identified above by the numbers 00 0000000000000000, 000000000000000000, 00 0000000000000000 to Taxpayer on December 19, 2003. Dept. Ex. No. 1.
2. Taxpayer, a Corporation, operated a tavern and liquor store on the south side of Anywhere. *Id.*
3. The Department's audit of Taxpayer's business covered the period of January 2000 through May 2003. *Id.*
4. Taxpayer did not maintain cash register tapes to substantiate sales reported. *Id.*
5. The Department circulated Taxpayer's vendors to obtain the amounts of yearly purchases. *Id.*, Tr. pp. 11-14.
6. The Department calculated Taxpayer's sales by applying a markup determined from an examination of selling prices on Taxpayer's shelves and discussions with the tavern and liquor store managers. *Id.*, Tr. pp. 15-17.

Conclusions of Law:

The admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 120/4, 120/8; *Copilevitz v. Department of Revenue*, 41 Ill. 2d 154, 242 N.E.2d 205 (1968); *Central Furniture Mart v. Johnson*, 157 Ill. App. 3d 907, 510 N.E.2d 937 (1st Dist. 1987).

In this case, when the Department's Notices of Tax Liability (Dept. Ex. No. 1) were entered into the record under the certificate of the Director its *prima facie* case was established, and the burden shifted to the taxpayer to overcome the Department's *prima*

facie case. *Anderson v. Dept. of Finance*, 370 Ill. 225, 18 N.E.2d 206 (1938); *Masini v. Dept. of Revenue*, 60 Ill. App. 3d at 14, 376 N.E.2d 325. 35 ILCS 120/4

In order to overcome the presumption of validity attached to the Department's *prima facie* case, Taxpayer is required to introduce into the record competent evidence, identified with its books and records showing that the Department's records are incorrect. *Masini v. Dept. of Revenue*, 60 Ill. App. 3d at 15, 376 N.E.2d 324 (1st Dist.1978); *Copilevitz v. Dept. of Revenue*, 41 Ill. 2d 154, 242 N.E.2d 205 (1968); *Dupage Liquor Store, Inc. v. McKibbin* 383 Ill. 276, 48 N.E.2d 926 (1943); *Howard Worthington, Inc. v. Department of Revenue*, 96 Ill. App. 3d 1132, 421 N.E.2d 1030 (2nd Dist. 1981). A taxpayer's testimony alone will not overcome the Department's *prima facie* case. *Central Furniture Mart v. Johnson*, *supra*. To overcome the Department's *prima facie* case the taxpayer must present consistent and probable evidence identified with its books and records. *Id.*

The law is clear that if the Department has reason to believe that the amount of taxable sales reported by a taxpayer is incorrect, it can determine the amount of sales that should have been reported by using its best judgment and information. *Anderson v. Department of Finance*, 370 Ill. 225, 18 N.E.2d 206 (1938). That is what the Department did in this case.

Taxpayer did not maintain adequate books and records to support the amount of taxable sales that it reported to the Department. For that reason the Department circularized Taxpayer's vendors to determine the amount of inventory it purchased during the audit periods. It then applied a gross margin factor to the purchases to determine Taxpayer's gross sales during the audit periods. It determined the gross margin

by examining the sales prices of liquor on the shelves and in discussions with Taxpayer's managers. The Department calculated the tax assessed based on these calculations. This method utilized the best judgment and information available to the Department to determine the correct amount of taxable sales that Taxpayer should have reported to the Department.

Taxpayer's defense in this case depended primarily on a report prepared by a self-employed accountant with an associate degree in accounting and 20 years experience that Taxpayer retained for this litigation. That accountant reviewed the Department's audit and conducted her own version of the Department's audit. Tr. pp. 42-44. She reviewed the few documents that Taxpayer provided to her, but she did not review cash register tapes, a general ledger, income statements, vendor invoices or a cash disbursement journal. She simply did her own version of the Department's audit and concluded that the Department's calculations were incorrect. Her calculations were not identified in any way to Taxpayer's books and records. Taxpayer had no books and records that would allow such a review.

The accountant's report was not persuasive. The case law cited above makes it clear that a Taxpayer must come forward with "competent evidence, identified with its books and records showing that the Department's records are incorrect." The analysis and report prepared by Taxpayer's accountant were not identified with Taxpayer's books and records as required by statute and legal precedent. Her report and conclusions are not sufficient to overcome the Department's *prima facie* case.

Taxpayer has failed to overcome the Department's *prima facie* case. Therefore, I recommend that the Notices of Tax Liability be made final.

Date: 8/19/2005

Charles E. McClellan
Administrative Law Judge